I object, however, to the majority suggesting that its action is premised on providing regulatory certainty.[7] At best, the majority solves a problem of its own making. They initiated the immediate proceeding and the highly controversial Title II docket in June, igniting a crisis across much of the industry and investment community. By some accounts, the majority has used this self-generated uncertainty as leverage in the negotiations leading up to this decision, a tactic I have reservations about the government using to manufacture support. I also have some apprehension that our legally precarious action today cannot provide the certainty promised, and that our decision may unfortunately add to the uncertainty. By avoiding definitions of key terms, questioning but not banning practices, couching decisions as "at this time" repeatedly, and inviting both case-by-case complaints and declaratory rulings, this action—in too many ways—is a first step, not a last step.[8]

THERE IS NO FACTUAL BASIS TO SUPPORT GOVERNMENT INTERVENTION.

Five years ago, in adopting the Internet Policy Statement, FCC Chairman Kevin Martin noted that "competition has ensured consumers have the[] rights [outlined in the Policy Statement] to date, and I remain confident that it will continue to do so."[9] It has. The Federal Trade Commission ("FTC") in its 2007 Net Neutrality report concluded that there was "no significant market failure of demonstrated consumer harm" to support Net Neutrality.[10] Our review revealed the same. Competition and consumer demand have ensured that the Internet remains open, and the majority offers no record evidence to suggest otherwise. The FTC accurately found that consumers "have a powerful collective voice ...[and] a strong preference for the current open access to Internet content and applications."[11]

The majority has resorted to metaphor: there are cracks in the infrastructure. But, our record does not support a conclusion of any structural failing. At best, there is a burned-out bulb in the Christmas lights. We endeavor to replace the entire electrical system to fix it. There is no systemic problem—no crisis of magnitude—to justify the majority's overreach.

The majority's repeated fallback is that network operators have incentives to act badly. Throughout the decision, the majority presumes a malign intent on the part of broadband providers for which there is no factual foundation. The language is consistently hypothetical—the word "could" alone appears over 60 times. The majority's rationale is flatly inconsistent with a decade of actual industry practice, which is devoid of any such global misconduct. The Order also fails to explain why other parts

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7 If regulatory certainty is one of the majority's priorities, they should have also closed the Title II docket today, slamming shut the door on proposals to apply highly intrusive monopoly-era common carrier restrictions on competitive broadband platforms.

8 The Order states that the Commission will "review all of the rules in this Order no later than two years from their effective, and will adjust its open Internet framework as appropriate." To promote regulatory certainty, this future proceeding should mirror our biennial review process under which the Commission's task is limited to determining whether any rule is no longer in the public interest as a result of meaningful competition. *See* 47 U.S.C. § 161. It would be hard to suggest that this Order provides any certainty if the Commission intends to conduct an open-ended review in 2013.

9 *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* Policy Statement, Separate Statement of Chairman Kevin Martin, FCC 05-150 (2005).

10 Federal Trade Commission, "Broadband Connectivity Competition Policy," at 11 (June 2007) ("*FTC Report*").

11 *Id.*

of the Internet community do not have similar incentives, or how such incentives alone could justify such sweeping action.

If the incentives and ability for misconduct are so strong, one would assume the evidentiary record would include widespread examples of anti-competitive conduct resulting in consumer harm. There is no such evidence. The Order provides only the same handful of dated examples of past conduct. There is no attempt to portray any of those isolated incidents as representative of bigger issues, and, tellingly, no examples of any ongoing misconduct are offered. The courts have clearly stated that rules cannot be based on claims that would "ameliorate[] a real industry problem" where an agency "cite[es] no evidence ... [of] an industry problem."[12]

From an economist's perspective, incentives alone are an inadequate basis to support this decision. Drs. Sidak and Teece explain that, "there is no empirical evidence or support in economic theory that such incentives exist or are sufficiently strong as to outweigh countervailing incentives."[13] The majority ignores those countervailing incentives as well as the empirical evidence on the record, relying only on speculative harms. They do not find market power on the part of network operators, asserting no need to do so. The majority sidesteps our own analysis that demonstrates that competition is strong and growing. Almost two-thirds of broadband customers find switching to be easy, and over a third of households have switched in the past three years.[14]

Given the nonexistent factual record of consumer harm, the majority is left to grandiose declarations about the Internet as an "indispensable platform supporting our nation's economy and civic life" to mask the clear deficiencies in its analysis. In doing so, they ignore the FTC's Net Neutrality Report's caution that regulators "should be wary of enacting regulation solely to prevent prospective harm."[15] The FTC was especially concerned with "adverse effects on consumer welfare" and "product

12 *Nat'l Fuel Gas Supply Corp. v. FERC,* 468 F.3d 831, 843, 844 (D.C. Cir. 2006)(finding that "if [an agency] chooses to rely solely on a theoretical threat, it will need to explain how the potential danger ...unsupported by a record of abuse, justifies such costly prophylactic rules."); *see also BellSouth Telecommunications Inc. v. FCC,* 469 F.3d 1052, 1060 (D.C. Cir. 2006)(finding that "the agencies' predictive judgment gives [it] no license to ignore the past when the past relates directly to the question at issue,").

13 J. Gregory Sidak and David J. Teece, "Innovation Spillovers and the 'Dirt Road' Fallacy: The Intellectual Bankruptcy of Banning Optional Transactions for Enhanced Delivery over the Internet," at 46. Forthcoming in 6 *Journal of Competition Law & Economics* (2010) (attached as Exhibit 2 to AT&T Reply Comments); *see also id.* at 45 (explaining that "[u]ntil empirical evidence is presented that network providers in fact have a substantial – and not merely theoretical – incentive to foreclose competing content and applications and that this incentive is likely to outweigh *countervailing* incentives, we believe that ... appropriate support for such regulation is lacking."); *see also* Declaration of Gary S. Becker and Dennis W. Carlton at 5 (attached as Attachment A to Verizon Comments)(concluding that "[t]he absence of widespread complaints about anticompetitive discrimination indicates that the FCC's competitive concerns are overstate in the current Internet environment."); Declaration of Marius Schwartz at 39 (attached as Exhibit 3 to AT&T Comments) (contending that "[g]eneralized references to future irreversible harm should not suffice to justify intrusive regulation in advance of clear evidence of a problem, especially when similar alarms have consistently been proven wrong.").

14 FCC Working Paper, "Broadband decisions: What drives consumers to switch – or stick with – their broadband Internet provider," at 1-2, 5 (Dec. 2010)(finding that "63% of broadband adopters with a choice of multiple providers said it would be easy to switch providers," and that "37% of home broadband users had switched Internet service providers (ISPs) in the last three years.").

15 *2007 FTC Report* at 11.

and service innovation."[16] I share the FTC's concerns. By regulating in anticipation of speculative harms, the majority cannot evaluate properly the regulatory costs of its actions, or target its actions to diminish any unintended consequences. The Commission has failed to take the approach I would have preferred: to focus any action on narrowly tailored solutions to address documented industry-wide abuses.

CONSUMERS WILL NOT BENEFIT FROM NET NEUTRALITY.

The majority repeatedly couches this as a pro-consumer or consumer-driven approach. They try to frame this as big business gatekeeper versus the consumer. This contention cannot withstand scrutiny. Upon closer inspection, the Order is focused on promoting the edge—Internet applications and services—over networks and consumers.

In the short-term, consumers will receive the same broadband service they do today and benefit from the same open Internet. In the mid- and long-term, consumers may well be worse off as government micromanagement will distort the future development of broadband networks and services. Deployment efforts to ensure that all Americans have access to broadband will be put at risk. Broadband adoption efforts to attract the third of American households that do not subscribe will be challenged. Affordability concerns will be magnified by forcing more of the cost of network investment onto consumers. And both consumers and entrepreneurs will be adversely affected if network upgrades and improvements are delayed or forgone, frustrating the ability to create or to use the next great application or service. Forgive me if I do not view these potential developments as pro-consumer.

The Order's analysis of the new rules also contradicts any declared consumer focus. With respect to paid prioritization, the majority concludes that prioritization arrangements with consumers "would be unlikely to violate" the nondiscrimination requirement. In stark contrast, prioritization arrangements with third party Internet companies "would raise significant cause for concern." In other words, the majority suggests that charging end-user customers is fine, but charging Internet companies may be problematic. While the majority is careful not to outlaw charging Internet companies, the apparent discouragement of such practices is misplaced. It sweeps too broadly and may foreclose current and future developments that could be pro-competitive and pro-consumer. It also may create workability issues under which a future quality-of-service commitment to the end-user consumer cannot be satisfied without a corresponding business relationship with the edge company. Economic theory is clear that there is potential value in two-sided markets, which could promote innovative business models and services, and reduce the costs of service to end-users, potentially increasing broadband adoption.[17] By seeking to carve

16 *Id.*

17 *See* Declaration of Michael D. Topper at 54 (attached as Attachment C to Verizon Comments) (arguing that "[c]ontractual pricing arrangements between broadband providers and application and content providers may result in the provision of new and better services. A two-sided pricing model where both consumers and content providers pay fees may also be a more efficient way for network providers to recover the substantial fixed costs of building, improving, and maintaining broadband access networks."). The Order acknowledges this economic theory, yet discounts its import suggesting "no broadband provider has stated in this proceeding that it actually would use any revenue from edge provider charges to offset subscriber charges." There is considerable expert testimony on the record regarding the potential of two-sided markets to reduce end-user pricing and benefit consumers, and the majority should have addressed the pro-consumer potential in a more forthright manner. *See, e.g.,* Declaration of Michael L. Katz, "Economic Arguments in the Network Neutrality Proceeding" at 30 (attached as Attachment B to Verizon Reply Comments) (explaining that "strategies such as two-sided pricing and offering of menus of service options can promote increased adoption. Specifically, network operators might use revenue from arrangements with online service or application providers to subsidize the costs of consumer access, which would increase adoption."); Declaration of Marius Schwartz at 18 (attached as Exhibit 3 to AT&T Comments)

(continued....)

out application providers from future compensation models, the practical effect of this decision may be that the bulk of the costs of building out next-generation networks—estimated to be $182 billion by 2015—will be borne by consumers.[18]

A similar preference for edge companies over consumers is reflected in the majority's approach to transparency.[19] Transparency should be about giving consumers the basic tools to make an informed decision. We should be working across the Internet economy towards standardized disclosures to inform consumer choice, and shed sunlight—both good and bad—on practices of networks, applications, and devices. That is not the approach the majority takes. The language in the Order is exceedingly prescriptive, and the all-encompassing approach seemingly prejudices Commission consideration of these matters in pending proceedings.[20] Specifically, the majority seeks to micromanage how information is conveyed to broadband consumers about their service. In my experience, government involvement in consumer disclosures is not a recipe for clarity. By doing so, the Order sets up a transparency regime that may be so detailed and engineering-focused, only Internet companies and special interest groups could find them useful. The average consumer will be no better off.

The majority's repeated spotlight on protecting Internet companies represents an apparent preference for the Internet edge over networks and consumers.[21] This is a fatal error, because no choice was necessary. In this instance, having your cake and eating it too was an actual option. The Commission should have sought to maintain an environment in which companies across the Internet economy continue to have the incentives to invest and innovate. In the majority's quest to address the unsubstantiated allegation that broadband providers may try to pick winners and losers, the government has picked its own winners. By promoting the edge over networks, we render the future development of

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(describing that "if broadband providers were to charge fees to content providers (and, indirectly, online advertisers), the likely result would be lower prices or other improved terms to consumers.").

18 Robert C. Atkinson and Ivy E. Schultz, "Broadband in America," Columbia Institute for Tele-Information, 68 (Nov. 11, 2009) ("*CITI Report*").

19 The focus on networks as the solitary challenge with respect to Internet transparency strains credibility. In the text of the Order, the majority references privacy and other considerations that seem more applicable to concerns consumers have primarily about applications and websites, not underlying broadband networks. This only underscore that these issues are best left to Congress or cross-industry groups working towards best practices and a more holistic and consistent approach. Given the Commission's overall lack of authority to act in this area, it is regrettable the majority is willing to draw artificial lines within the Internet economy, anoint certain players as gatekeepers, and cherry pick the type of player and conduct it wishes to regulate in an arbitrary manner.

20 *Consumer Information and Disclosure Truth-in-Billing Format IP-Enabled Services,* Notice of Proposed Rulemaking, CG Docket No. 09-158, FCC 10-180 (2010).

21 Equally unconvincing is the claim that new entrepreneurs—the next Google, the next Yahoo!—are the beneficiaries of the rules. The majority has crafted rules that will provide a regulatory advantage for those companies that benefit the most from today's business models. In particular, those edge companies with their own multi-million dollar—if not multi-billion dollar—infrastructures comprised of private networks, server farms, and content delivery networks will benefit. For new ventures, the Order may dissuade networks and new entrants from experimenting in new ways to reach consumers, to compete with better financed and established Internet companies, and to formulate pro-consumer, pro-competition business models that do not yet exist.

networks a secondary matter. This is the antithesis of the virtuous cycle of Internet investment the majority espouses.

THE ORDER MAY INHIBIT THE DEVELOPMENT OF TOMORROW'S INTERNET.

One of my primary misgivings with this Order is that it fails to confront in a forthright manner the substantial risk that this action may distort the future of the Internet. The Order's focus is on maintaining the "status quo" and "current practices" in how networks are managed and operated. Given the dynamic nature of the Internet, this is the wrong objective. The Internet is not a mature market. There continues to be a great amount of experimentation in business models, business relationships, customer usage patterns and expectations. The majority's approach will inhibit the ability of networks to freely evolve and experiment, and to seek out the differentiation that breeds opportunity and consumer choice. The threat of government censure will unmistakably chill new developments, including those that would be pro-consumer and pro-competition. Innovate at your own risk is the wrong message to send.

The stakes are heightened because networks cannot stand still. Estimates project that by 2014 the Internet will be four times the size it was last year, and mobile data will double each and every year.[22] The growing prevalence of real-time applications and bandwidth-intensive applications like HD television will only intensify the challenges faced by network operators. CITI estimates that the bulk of the $182 billion to be invested in the next five years will be focused on "increasing broadband capacity and speed in currently served areas."[23] The capacity required to meet the escalating demands of existing users—let alone new users—will strain the resources of all operators, and test network management practices.

To give some context to the challenge, I pose this basic question: would you be happy to have your Internet connection (*e.g.*, speed, latency, and features) from 2005? I know I would not. When we look back in 2015, how will we answer that question about today? How much of the 2010 network did we just lock in for our future selves? There are too many variables for us to make a reliable prediction, which underscores that the Commission should act with more humility and in much more targeted ways when faced with industry shaping decisions.

The measuring stick for if, and how far, we have fallen behind will increasingly be networks overseas. The majority has taken a far more interventionist approach to Net Neutrality than other global regulators. The European Commission's Neelie Kroes has consistently called on regulators to "avoid over-hasty regulatory intervention," and to steer clear of "unnecessary measures which may hinder new efficient business models from emerging."[24] As a result, operators overseas from Europe and Asia – free from prescriptive rules and ominous warnings – will be the ones innovating, and creating value for consumers and businesses. As a result, the United States may cede its role as experimenter, innovator,

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22 Cisco Visual Networking Index: Forecast and Methodology, 2009-2014 (June 2, 2010) (available at http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481360_ns827_Networking_Solutions_White_Paper.html).

23 *CITI Report* at 68.

24 Remarks of Neelie Kroes, "Net Neutrality in Europe," Address at ARCEP Conference (Apr. 13, 2010) (available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/153); *see also* Remarks of Neelie Kroes, "Net Neutrality, the Way Forward," European Commission and European Parliament Summit on The Open Internet and Net Neutrality in Europe (Nov. 11, 2010) (available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/643) (advocating that regulators "avoid regulation that might deter investment.").

and market leader in Internet networks and technologies. The economic implications of that for this nation could be stark for our overall global competitiveness and for job creation.

The majority also fails to account properly for a prominent Wall Street analyst's recent observation that "[b]uilding networks is hard. Earning a return on them is even harder."[25] By the majority's action, the Commission may have further increased the degree of difficulty. I am troubled by the negative treatment so many vital components of our modern broadband networks receive in this Order. We have turned paid prioritization into a dirty word, a dangerous tool. To me, it is about quality of service, and optimizing services for real-time applications. I reject that such measures are anti-competitive on their face. In fact, 4G wireless networks have prioritization built into the standard to provide optimized service across classes of offerings.[26] The record contains evidence of other services and offerings under which prioritization is offered today in a pro-consumer, pro-competitive manner, typically in commercial settings.

Specialized services—a term the Commission created in this docket—receives no better handling. Specialized services have been one of the primary drivers of greater voice and video competition in the United States. They have also been fundamental in justifying the huge cost necessary to build-out today's Internet, and will be central to the analysis in raising additional risk capital to improve existing networks and deploy new networks. Relatedly, specialized services have also helped to offset the costs of broadband to consumers. The Commission should be promoting specialized services to help spark greater broadband deployment.

Network management is similarly characterized as a potential loophole for misconduct, not an engineering marvel that enables services to operate, mitigate congestion, thwart threats both domestic and foreign, and block unwanted materials. These are not dumb pipes for which network management is used for only nefarious purposes.

I do not think the majority believes any of these services or functionalities to be inherently problematic, but the overwhelming focus on the potential for wrongdoing is misplaced. It is fair to highlight potential areas of concerns, but only in the context of a more balanced and neutral presentation that outlines the different dimensions of today and tomorrow's networks more objectively. I care about how these issues are presented because even if the rules are silent about many of these issues, the text and tone of the Order will inform operators' assessment of the potential risks of governmental rebuke in determining whether to approve an engineer's proposal for a new approach, a new practice, or a new business model to serve consumers better.

THE COMMISSION IS MISCAST AS THE INTERNET'S REFEREE.

The genius of the Internet is that there is no central command, no unitary authority to dictate how innovation is to occur. No one must ask for permission. The majority has altered fundamentally that winning formula, forcing the Commission into the role of judging how the Internet and broadband networks will evolve. By adopting rules that will require significant interpretation, by creating new undefined terms, and by muddling its analysis with warnings and cautionary notes, the majority has ensured that new innovation and new practices will be subject to its approval, and the corresponding

25 Craig Moffett, "Weekend Media Blast: Building Networks is Hard ... Earning a Return on Them is Even Harder," Bernstein Research (Dec. 17, 2010).

26 *See* 3rd Generation Partnership Project (3GPP), "Technical Specification Group Services and System Aspects; Policy and charging control architecture (Release 9)" December 2009 (available at: http://ofdm.jp/3GPP/Specs/23203-930.pdf).

delay and uncertainty. As networks, devices, and applications continue to evolve and converge, the majority's artificial line-drawing of imposing regulatory costs only on networks will necessarily plunge this agency into a definitional quagmire. As it does, I fear the government will assume too prominent a role in shaping tomorrow's Internet.

I have related administrative concerns with our ability to administer the regime established today.[27] The majority has now given the Commission a significant responsibility to manage a space as dynamic as the Internet. Government will be hard pressed to manage the next-generation of the Internet as well as competition and consumer demand has done for the previous generations. We will need to address issues that arise in a timely, thoughtful, and technical manner. Non-governmental groups like the Broadband Internet Technical Advisory Group (BITAG) should be the primary forum for disputes, and the Commission would be wise to rely on such expert resources.[28] These groups have the ability to craft engineering-based solutions in a more flexible, responsive, and efficient manner.

THE COMMISSION LACKS AUTHORITY TO ADOPT NET NEUTRALITY RULES.

"The FCC, like other federal agencies, 'literally has no power to act . . . unless and until Congress confers power upon it.'"[29] The Supreme Court has cautioned that "the Commission's estimations of desirable policy cannot alter the meaning of the federal Communications Act."[30] Congress has never given the Commission authority to regulate Internet network management, a fact validated by the court in *Comcast.* Lacking any statutory authority to act in this area, the Commission's effort to establish Net Neutrality rules should have been a non-starter.[31] To paraphrase the D.C. Circuit, I "find nothing in the statute, its legislative history, the applicable case law, or agency practice indicating that Congress meant to provide the sweeping authority the FCC now claims...the agency's strained and implausible interpretations of the definitional provisions ... do not lend credence to its position."[32]

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27 By naming itself Internet referee, the Commission has also introduced a new strategic option into every commercial dispute in the Internet sector. Parties will have the ability to try to manipulate our procedures for their commercial gain, or as simple leverage to extract concessions in private deals. This is not conjecture. In the buildup to this Order, we have seen countless different disputes across the Internet sector be labeled as Net Neutrality issues. I fear actual engineering issues will be subsumed by commercial and political considerations.

28 BITAG is an independent non-profit organization, "whose mission is to bring together engineers and other similar technical experts to develop consensus on broadband network management practices or other related technical issues that can affect users' Internet experience, including the impact to and from applications, content and devices that utilize the Internet." (available at http://members.bitag.org/kwspub/home/).

29 *American Library Ass'n v. FCC,* 406 F.3d 689, 691, 698 (D.C. Cir. 2005) ("*ALA*") (citing *Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 374 (1986)).

30 *MCI Telecommunications Corp. v. AT&T Co.,* 512 U.S. 218, 234 (1994) ("*MCI*").

31 *See* Remarks of Chairman Julius Genachowski, "Preserving Internet Freedom and Openness" (Dec. 1, 2010) (explaining that "this proposal would build upon the strong and balanced framework developed by Chairman Henry Waxman").

32 *ALA,* 406 F.3d at 704.

The majority, however, tries the everything-but-the-kitchen-sink defense – 24 different claimed statutory bases. The majority elects sheer quantity to make up for quality, and, in doing so, contorts the letter and spirit of the Act to try to justify rules adopted in a result-orientated process. The bulk of the legal support is based on ancillary authority grounds. The majority has swapped in a different set of statutory provisions from the ones the *Comcast* court rejected, but these provisions share the same inherent infirmity. The courts have long required any regulation to be "reasonably ancillary to the effective performance of the Commission's various responsibilities."[33] Ancillary authority has developed as a gap filler to provide the Commission with the tools to conduct the tasks explicitly directed by Congress. The majority's intent here is to regulate broadband platforms, not protect traditional voice, video, broadcast or audio services. The references to direct authority are a pretext to try to aggregate the desired authority, which would be far greater than any gap filling exercise. In the end, these ancillary authority claims are indistinguishable from the ones rejected by the court in *Comcast.*

I will, therefore, focus on section 706(a), which receives the bulk of the majority's analysis. I am not persuaded by the majority's attempt to twist a 14-year old deregulatory policy statement into a grant of direct authority. The majority's view of section 706(a) is inconsistent with a plain reading of the statute, sound notions of statutory interpretation, and over a decade of consistent Commission and judicial precedent.

As the Commission has explained repeatedly, section 706(a) "gives this Commission an affirmative obligation to encourage the deployment of advanced services, relying on our authority established elsewhere in the Act."[34] Our decisions are "informed" by section 706.[35] It is a guidepost as to how to use our statutorily mandated responsibilities. The Commission held long ago that the "most logical statutory interpretation is that section 706 does not constitute an independent grant of authority."[36] And that is precisely how the Commission has successfully incorporated section 706 into its decision-making for over a decade. The Commission has repeatedly explained that "the directives of section 706 ... require that we ensure that our broadband policies promote infrastructure investment, consistent with our other obligations under the Act."[37]

The majority effectively attempts to rewrite this straightforward provision and its clear-cut history. This is ultimately an unsuccessful gamble. The core of the majority's analysis is its mischaracterization of the 1998 *Advanced Services Order.* Under the majority's view, the Commission has only interpreted a single clause from section 706(a)—regulatory forbearance—not the section as a

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33 *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

34 *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, ¶ 74 (1998) ("*Advanced Services Order*").

35 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 278 (2003).

36 *Advanced Services Order,* ¶ 77.

37 *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260, ¶ 52 (2008); *see also Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853,¶ 19 (2005) ("*Wireline Broadband Order*") (finding that "the directives of section 706 of the 1996 Act require that we ensure that our broadband policies promote infrastructure investment, consistent with our other statutory obligations under the Act.").

whole.[38] The Commission raised this identical argument to the *Comcast* court, and it was appropriately rejected.[39] In June, subsequent to the *Comcast* decision, in the Title II proceeding, the Commission seemingly abandoned this theory by asking if it should "change[] its conclusion that section 706(a) is not an independent grant of authority."[40] In doing so, the Commission suggested no caveat or limitation tied to the forbearance authority. The court this April and the agency this June got it right: the Commission should not deviate from its historic understanding of section 706(a) as a policy statement.[41] Pursuing this strained reading of section 706(a) to serve as the cornerstone of the majority's legal authority to regulate the Internet is unsound.

Even if section 706 were a grant of authority, that provision could not support today's prescriptive and investment-chilling action that erects, not removes, barriers to broadband network

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38 Even if the *Advanced Services Order* interpretation were limited to the "regulatory forbearance" language as the majority now claims, there is no reasonable reading under which that interpretation would not be controlling on section 706(a) as a whole. Specifically, the term "regulatory forbearance" appears in the middle of a list, and every item on the list is prefaced by the same language, the language authorizing the Commission to "utiliz[e] in a manner consistent with the public interest, convenience, and necessity," the various tools listed. Thus, if the Commission found no independent authority to forbear, there could then be no independent authority to take any other action mentioned in section 706(a). It would be illogical to suggest that some of the items on the list convey independent authority while others do not.

39 *Comcast,* 600 F.3d at 658-59. The majority's expansive reading of the 2008 *Ad Hoc* decision is equally misplaced. *Ad Hoc Telecom. Users Committee v. FCC,* 572 F.3d 903 (D.C. Cir. 2009). In that case, the court upheld a deregulatory measure (special access relief) that was pursuant to the Commission's section 10 forbearance authority, not section 706(a). *Id.,* 572 F.3d at 907. The *Comcast* court already rejected the majority's claim, explaining that the court in *Ad Hoc* "cited section 706 merely to support the Commission's choice between regulatory approaches clearly within its statutory authority under other sections of the Act." *Comcast*, 600 F.3d at 659. The *Comcast* court concluded explicitly that, "[n]owhere did [the D.C. Circuit] question the Commission's determination that section 706 does not delegate any regulatory authority. The Commission's reliance on section 706 thus fails." *Id.* Tellingly, the Commission's own brief in that case characterized section 706 in the manner it has always been understood: "Guided by the deregulatory mandate of section 706, the Commission - in a series of decisions affirmed by the courts - has taken measures designed to ease regulatory burdens on providers of broadband services." Brief for Respondents at 8, *Ad Hoc Telecom. Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009) (No. 07-1426). This is a deregulatory power.

40 *Framework for Broadband Internet Service*, Notice of Inquiry 25 FCC Rcd 7866, ¶ 36 (2010).

41 By attempting to manipulate our prior interpretation, the majority has also failed to provide procedurally an adequate justification to change the interpretation of section 706(a) from policy statement to direct authority. The Supreme Court recently emphasized that when an agency changes its position it "must show that there are good reasons for the new policy." *FCC v. Fox Television Stations*, 129 S.Ct. 1800, 1811 (2009). There is a heightened burden here because the "prior policy has engendered serious reliance interests." *Id.* Network operators have invested billions into their infrastructure relying on the deregulatory approach to broadband networks best evidenced, until now, by the section 706 deregulatory policy statement. The Commission, therefore, must provide "a more detailed justification than would suffice for a new policy created on a blank slate." *Id.*, at 1811. Not only does the Commission fail to offer any justification, it also failed to establish a factual record on this question. In another proceeding, the Commission asked the right questions about "revisit[ing] and chang[ing] its conclusion that section 706(a) is not an independent grant of authority." *Framework for Broadband Internet Service*, Notice of Inquiry 25 FCC Rcd 7866, ¶ 36 (2010). We further asked what "findings would be necessary to reverse that interpretation." *Id.* The Commission failed to properly justify a change in interpretation, and is, therefore, not entitled to do so in this proceeding.

infrastructure investment. The text of section 706(a) is clear: it is about "encourag[ing]" broadband "deployment," with clear deregulatory focus on "remov[ing] barriers to infrastructure investment."[42] The D.C. Circuit has held "section 706(a) identifies one of the Act's goals ... namely, removing barriers to infrastructure investment."[43] The Commission itself has repeatedly held the same.[44] Section 706 is about deployment of broadband network infrastructure, and the Commission has no authority to erect obstacles in the name of removing them. The majority attempts to muddle the issue, referring to "overall investment in Internet infrastructure." It strains all credibility to contend that imposing Net Neutrality obligations would do anything to promote broadband deployment.[45] Investment in other parts of the Internet—in applications and devices—is not relevant to a section 706 analysis.

By reading out of the provision any deregulatory focus, the explicit broadband deployment purpose, and the removal of barrier limitation, the Commission has given itself plenary authority to regulate the Internet. Anything that promotes the "virtuous cycle" in the Internet ecosystem could be regulated under this analysis. This is my biggest concern with the majority's section 706(a) analysis. In essence, the majority has replaced an unbounded ancillary authority rejected by the *Comcast* court with an equally unbounded direct authority under section 706(a).

The majority is quite candid that this was its intent: it sought a power as broad as its pre-*Comcast* understanding of its ancillary authority. The Order explains that "our authority under Section 706(a) is generally consistent with... ancillary jurisdiction ... before the *Comcast* decision." The *Comcast* court had significant concerns with the Commission's legal theories under which "if accepted it would virtually free the Commission from its congressional tether."[46] The same fundamental concern applies here with equal force: trading one unlimited power for another is far from comforting to me, or the courts. I also

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42 47 U.S.C. § 1302(a).

43 *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004).

44 *See, e.g., Wireline Broadband Order*, ¶ 19.

45 The cursory attempt to use section 706(b) as direct authority suffers a similar fate. That provision directs the Commission to evaluate the deployment of advanced services. The majority's action bears no logical connection with Congress's directive to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." 47 U.S.C. § 1302(b). The majority raises barriers here, not lowers them, and takes steps that will not accelerate broadband deployment. Further, it making the negative finding triggering this authority, the Commission outlined the "immediate" steps it intended to take, noting "several [active] proceedings" related to implementing recommendations to the National Broadband Plan and "other[proceedings] still be to be commenced." *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Amended by the Broadband Data Improvement Act*, Order, FCC 10-129, ¶ 29 (2010). The Net Neutrality proceeding—initiated prior to that finding—was never mentioned as one of the steps required by section 706(b). I also have institutional concerns in the lack of discussion of how the section 706(b) power functions, given it has never been evoked before. We sidestep the question of what happens if a subsequent section 706 report finds broadband deployment to be timely again. The attempt to use this power so broadly here also underscores the need for a more searching and analytically sound approach to the section 706 reports. The Commission's finding of nationwide untimely and unreasonable deployment was, among other defects, overly broad. The analysis should have been significantly more granular to identify particular geographic areas or communities for which deployment has lagged, and I hope we correct that error in future reports.

46 *Comcast*, 600 F.3d at 655.

have to believe a court will be skeptical of the timing and manner in which the majority has discovered section 706(a) to be a superpower, unlocked only after an adverse court opinion and political pressure to find some legal foundation to justify Net Neutrality rules.

To that end, it is also instructive where in the Act section 706 was located. Congress placed this provision – the provision the majority would make the centerpiece of all broadband and Internet regulation going forward – in a footnote to a non-substantive regulatory requirement.[47] I am "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[48] I agree with the Supreme Court's analysis that "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[49] The Commission lacks authority to adopt Net Neutrality rules under any of the legal theories put forth in the Order.

THE COMMISSION ACTS IMPROPERLY AS A QUASI-LEGISLATIVE BODY.

The Commission adopts rules that are almost word-for-word a draft bill under consideration in Congress. We are a creature of Congress, not Congress itself. Using a legislative proposal to base our action underscores that the majority acts beyond the appropriate role of an independent agency. The majority does what Congress could not, or would not do. They adopt legislation and the implementing order all in one step. By definition, the majority does much more than the proposed draft bill by exercising its own discretion and judgment. The draft bill would have given the Commission very specific responsibilities and powers. In contrast, by doing it themselves, the majority has created a sweeping Internet policy without any jurisdictional limits. When the Federal Communications Commission feels compelled to explicitly "decline to apply our rules directly to coffee shops, bookstores, [and] airlines," it illustrates the broad scope of these rules, and the lack of any ascertainable outer limits to our claimed authority.

By this action, the majority has blurred the line between legislator and regulator. In doing so, this decision raises broader concerns about our agency's institutional credibility. The long-term concern is that a pattern of action to seek out perceived harms beyond our core competencies may erode the trust in the Commission to be an expert agency on those things for which Congress has given us clear statutorily mandated responsibilities. This is not meant to be alarmist: the vast majority of our portfolio is done on a consensus and bipartisan basis well within our delegated authority. The bad news is that big decisions garner far more attention, and can affect our standing in a disproportionate manner. Institutionally, we must resist the desire to stretch our authority beyond its breaking point to capture some real or perceived concern. Here, given the lack of any record evidence of an immediate crisis to resolve, the appropriate approach should have been to allow Congress to deliberate on the proper means to address network management concerns. The Supreme Court has stressed that if a statute "falls short of providing [authority for an agency to adopt] safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the [agency] or the courts, to address."[50]

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47 Section 706 was ultimately codified at section 1302, twelve years after it was enacted.

48 *FDA v. Brown & Williamson*, 529 U.S. 120, 160 (2000).

49 *Id.*, 529 U.S. at 121; *see also, MCI*, 512 U.S. at 231 ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate regulated to agency discretion and even more unlikely that it would achieve that through such a subtle device...").

50 *Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

When the Commission makes political decisions and takes actions best left to elected officials, our proceedings inevitably turn more partisan and more controversial. This agency lacks the institutional capability of handling divisive issues of this import. Indeed, issues of this magnitude, with such significant long-term consequences, are decisions that should be left to Congress. That is particularly true here given the clear interest of Congress in the subject matter. Over 300 members of Congress have expressed concern with the Commission's approach to regulating the Internet,[51] and a vocal minority has offered its support for the majority's approach.[52] Last week, 29 U.S. Senators "strongly urge[d the Commission] to abandon [its] decision to impose new restrictions on" broadband services.[53] In their view, "this is an unjustified and unnecessary expansion of government control," and the resulting "cost of th[is] action will be measured in investment foregone, innovation stifled, and most importantly, jobs lost."[54] The incoming leadership of the House Energy and Commerce Committee last week wrote noting that this "is likely the most controversial item the FCC has had before it in at least a decade. It holds huge implications for the future of the Internet, investment, innovation, and jobs."[55] Taken as a whole, the only appropriate course of action was to defer to Congress.

THE COMMISSION HAS STRAYED FROM A PRO-JOBS CONSENSUS AGENDA.

Regrettably, this proceeding has led me to question our priorities. The Commission repeatedly moved Net Neutrality to the top of our to-do list, an issue that is the cause célèbre of the institutional left. But, from a legal and factual perspective, it remains a solution in search of a problem. In contrast, action languishes in other areas where there is bipartisan support and objective evidence of real problems necessitating prompt government action. The Commission unanimously adopted a *Joint Statement on Broadband* this Spring that called for action on the nation's core communications challenges: broadband deployment and adoption; spectrum reform; universal service and intercarrier compensation reform; and a public safety network.[56] Our focus belongs on that agenda, an actual pro-growth, pro-jobs game plan focused appropriately on infrastructure and private investment as recommended by the National Broadband Plan.

Starting today, we should redouble our efforts to craft policies to create the incentives and regulatory environment necessary to attract the billions in risk capital necessary to expand and improve our broadband infrastructure. That capital is the critical first step in the formation of new high-paying jobs laying the fiber and building the towers. Central to those policies should be spectrum reform. The majority's concerns about potential gatekeepers would be best addressed by building more roads: 4G and next generation wireless offerings can be the third, fourth, fifth, and sixth broadband choice for consumers. That is why a spectrum policy focused on 4G is critical, and the need for a clear roadmap to

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51 *See e.g.*, Letter from Ranking Member Joe Barton *et al* to Honorable Julius Genachowski (Nov. 19, 2010); Sara Jerome, "Hutchinson pans net-neutrality proposal," The Hill (Dec. 1, 2010); Press Release, "Upon Urges FCC to Cease and Desist on Net Neutrality" (Dec. 1, 2010).

52 *See e.g.*, Press Release, "Kerry, Dorgan, Wyden Urge FCC to Act This Year on Open Internet," (Nov. 30, 2010).

53 Letter from Senator John Ensign *et al* to Honorable Julius Genachowski (Dec. 15, 2010).

54 *Id.*

55 Letter from Chairman Fred Upton *et al* to Honorable Julius Genachowski (Dec. 16, 2010).

56 *Joint Statement on Broadband*, FCC 10-42, ¶ 3 (Mar. 16, 2010).

industry about future spectrum availability is paramount to help enable greater broadband competition and consumer choice.

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I fear that today's action is not the end of this debate because of its significant consequences for the Internet, for the jurisdictional authority of this agency, and for the proper role of the FCC. This debate may well move to different fora, but I fear it will continue to take up too much of the oxygen in our community.

That said, I remain always the optimist. When we work together, there is so much good we can do. I hope the New Year brings a fresh perspective on our nation's communications challenges and a renewed focus on working collaboratively together.